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NO. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SONA FOOD PRODUCTS COMPANY,
Petitioner,

v.

HAIN PURE FOOD CO., INC.,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

LYON & LYON
A Partnership Including
JAMES W. GERIAK
COE A. BLOOMBERG
Professional Corporations
800 Wilshire Boulevard
Los Angeles, California 90017
(213) 489-1600

LYON & LYON
WILLIAM E. MOUZAVIRES
1200 17th Street, N.W.
Washington, D.C. 20036
(202) 296-6028

Counsel for Respondent
Hain Pure Food Co., Inc.

PANDICK PRESS, LOS ANGELES, 1945 S. FIGUEROA, LOS ANGELES, CALIFORNIA (213) 747-4321

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PREAMBLE

Sona's Petition attempts to create the illusion that damages were awarded in the present case without a showing of actual confusion. The facts are exactly to the contrary. There was substantial evidence of actual confusion in the present case and there was a finding of fact with regard to actual confusion by the District Court prior to the accounting. Thus, this case presents no conflict between the Circuits nor does it present any issue worthy of this Court's attention.

EVIDENCE OF ACTUAL CONFUSION

The Galavan Letter and Affidavit

Hain's wholly owned subsidiary, Hollywood Foods, Inc., received a letter from a deceived customer who bought the goods of Sona thinking that they were the goods of Hain. That customer was Mrs. Leslie Galavan and her letter is attached hereto as Appendix A and is reproduced in its entirety below:

"Hollywood Foods, Inc.

Dear Sirs,

As a user of many of your health products I was really surprised to see that "SONA" foods came out with a Safflower or Soy Oil as you. However, theirs is in *the exact same bottle* & the *label is almost identical*—without really looking, I picked up a Sona brand. It wasn't *till I got home & looked that I discovered it.* Maybe you already know—if not maybe you can do something!!

It sure doesn't seem right—

/s/ Leslie Galavan"

(emphasis added)

Mrs. Galavan also executed an affidavit which stated, in pertinent part:

"That in the early part of 1977 I purchased a bottle of SONA safflower oil, ... mistaking it for a bottle of Hollywood safflower oil . . . .

That I found the appearance of the SONA safflower oil product to be *confusingly similar* to the safflower oil product of Hollywood Foods Inc., and was *thereby deceived and purchased* a bottle of SONA product rather than purchasing the intended bottle of Hollywood Foods, Inc. safflower oil;" (emphasis added)

In its decision in this case, the Ninth Circuit Court of Appeals made specific reference to the Galavan letter and affidavit as follows (page 4 of Appendix 3 to Petitioner's Brief):

"In the accounting hearing, Hain introduced evidence of actual confusion and loss of sales in the Galavan letter and affidavit."

Sona Slavishly Imitated Hain's Trade Dress

Exhibits A and B to the District Court's initial decision dated May 19, 1980 were not included as part of Appendix 2 to Petitioner's Brief which purports to be the District Court's decision. Exhibits A and B to the District Court's decision are attached hereto as Appendices B and C and are photographs, respectively, of front and back views of a pair of Hain and Sona bottles which show the remarkable similarities in the trade dress of Hain and Sona. This close similarity of trade dress made it highly probable that actual confusion would occur and, in fact, such confusion did occur.

Thus, it is hardly any surprise that Mrs. Galavan was among those who were actually confused and it is plain that the award of damages in this case was premised upon a substantial showing of actual customer confusion.

Sona's Petition, however, appears to attack the Ninth Circuit for its approval of receipt of evidence of actual confusion in an accounting procedure and further appears to argue that such accounting proceeding should not have been permitted to commence. Stated more simply, petitioner makes a purely procedural argument regarding commencement of an accounting in an effort to keep its ill-gotten gains. However, there was no procedural impropriety.

PROPER PROCEDURE WAS EMPLOYED

In its *pre*-accounting findings of fact, the District Court found, in Finding No. X (page 11 of Appendix 1 to Petitioner's Brief):

"Defendant's continued usage of the label, trademark and trade dress of plaintiff in association with defendant's goods and the use of such label, trademark and trade dress

> by defendant *has caused* . . . confusion in the trade . . . and such usage by defendant has been in bad faith. Defendant has admitted that such confusion *has occurred.*" (emphasis added)

Thus, there was a pre-accounting finding by the District Court of actual confusion and, indeed, a finding that the defendant Sona had admitted the existence of such confusion. Therefore, the arguments made in Sona's Petition are refuted by the indisputable factual history of this case. Sona's Petition makes no argument, nor could it properly do so, that the District Court's findings (which were affirmed by the Court of Appeals) are erroneous and should be reversed by this Court for it is not the function of the United States Supreme Court to review findings brought to it by an unsuccessful litigant.

Evidence of Actual Confusion Is Required, At Most, For Recovery of Damages—Not For Commencement Of An Accounting

Petitioner Sona attempts to read something into the cases which it cites which is not there, namely, that there must be pre-accounting evidence of actual confusion in order for an accounting to proceed. Rather, each of Sona's cases simply states the view that there should be evidence of actual confusion in order for there to be a recovery of damages—*not* as a precondition to commencement of an accounting.

Parkway Baking Co. v. Freihoffer Baking Co., 255 F.2d 641, 648 (3 Cir. 1958) states:

> "However, a plaintiff in order to *make out a cause of action for damages* under Section 43(a) must show not only that the defendant's advertisement is false, but also that this falsification actually deceives a portion of the buying public." (emphasis added)

Similarly, *Hesmer Foods, Inc. v. Campbell Soup Co.*, 346 F.2d 356, 359 (7 Cir. 1965), holds:

> "To establish a *right to damages*, actual deception must be shown." (emphasis added)

In like manner, it was held in *Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 647 (6 Cir. 1982) that:

> "Although it is necessary to prove that the buying public was actually deceived *in order to recover damages* under Section 43(a) of the Lanham Act . . ." (emphasis added)[1]

Thus, it is plain that none of these cases in any way suggests that evidence of actual confusion is a precondition to commencement of an accounting.

Insofar as recovery of damages is concerned, we have shown above that substantial evidence of customer confusion was presented in the present case and that, accordingly, the award of damages was in accord with the views expressed in *Parkway, Hesmer* and *Frisch's, supra.*

Furthermore, with regard to commencement of an accounting, the law has long been settled that the District Court has substantial discretion with regard to conducting an accounting, as was done in the present case, as a separate proceeding. For example, in *National Van Lines v. Dean*, 237 F.2d 688, 694 (9 Cir. 1956), it was held:

> "Whether or not, if unfair competition is shown, an accounting proceeding should be ordered, preparatory to the allowance of damages, is largely a matter of discretion."

The exercise of discretion by the District Court in this manner was also approved in *RJR Foods, Inc. v. White Rock Corp.*, 603 F.2d 1058, 1061 (2 Cir. 1979).

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[1] In addition, this statement in *Frisch's* is pure dictum. This case involved only a preliminary injunction and neither an accounting nor damages were actually considered by the court.

THERE IS NO CONFLICT IN THE CIRCUITS

Petitioner Sona has attempted to manufacture a conflict in the Circuits when none in fact exists. The bifurcated accounting procedure adopted by the District Court in the present case was well within its discretion and the award of damages was made after substantial evidence of customer confusion had been presented. This award was entirely consistent with the cases from other Circuits cited by Petitioner.

IT IS TIME FOR SONA TO DISGORGE ITS ILLEGAL GAINS

Sona profited handsomely from its trade deception. As held in Finding No. 14 made by the District Court after the accounting (page 7 of Petitioner's Appendix 2):

> "When defendant adopted plaintiff's label, trademark and trade dress, its sales of such infringing products increased dramatically; when defendant stopped infringing, its sales of such products decreased dramatically."

In addition, Sona acted in contempt of the injunction entered in this case, as held in Accounting Finding No. 5 (page 5 of Petitioner's Appendix 2):

> "Defendant failed to stop its sales of infringing product following the entrance of this Court's Order and Injunction of January 30, 1978."

The character of Sona's commercial activity in the present case is even worse than that characterized in *Monsanto Chemical Co. v. Perfect Fit Products Mfg. Co.*, 349 F.2d 389, 396 (2 Cir. 1975) as that of a "commercial racketeer". To permit Sona to keep the income derived from its illegal activity would plainly be to encourage it to recidivism.

Indeed, we believe that the only possible reason which could exist for Sona's filing of this Petition is to delay for as long as possible payment for the damages which it inflicted upon Hain. Thus, we respectfully request an early decision on Sona's Petition.

LYON & LYON
A Partnership Including
JAMES W. GERIAK
COE A. BLOOMBERG
Professional Corporations

By _____
James W. Geriak

800 Wilshire Boulevard
Los Angeles, California 90017
(213) 489-1600

LYON & LYON
WILLIAM E. MOUZAVIRES
1200 17th Street, N.W.
Washington, D.C. 20036
(202) 296-6028

Counsel for Respondent
Hain Pure Food Co., Inc.

Leslie Galavan

May 2, 1977

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Hollywood Foods, Inc.

Dear Sirs,

As a user of many of your health products I was really surprised to see that "SONA" foods came out with a safflower or soy oil as you. However, this is in the exact same bottle & the label is almost identical — without really looking, I picked up a sona brand. It wasn't till I got home + looked that I discovered it. Maybe you already know — if not maybe you can do something!!

It sure doesn't seem right —

Sincerely,

Mrs. Leslie Galavan

Sona
SAFFLOWER
OIL
32 FL. OZ. (1 QT.)
HOLLYWOOD
SAFFLOWER
OIL
32 FL. OZ. (1 QT.)

APPENDIX B

APPENDIX C